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DEPT PASS USTR FOR CHANDLER AND CHOE-GROVES

E.O. 12958: N/A
TAGS: ETRD KIPR CA
SUBJECT: EVOLUTION OF INDUSTRY RESPONSE TO CANADA'S DRAFT COPYRIGHT AMENDMENT LEGISLATION

REF: A. OTTAWA 2970 (CANADIAN STAKEHOLDERS' CONCERNS ON COPYRIGHT AMENDMENT)
¶B. OTTAWA 2833 (DEMARCHE ON SPECIAL 301 OUT OF CYCLE REVIEW)

¶1. (SBU) Summary: Canadian rightsholders seem to be positioning themselves to accept notice and notice as a step in the negotiations surrounding Canada's proposed amendment to the Copyright Act. Internet service provider (ISP) liability waivers in the draft text have rightsholders fearing that Canada may again become an IPR "wild west" with legal filesharing. Rightsholder industries are also united in their despair over the weakness of remedies against technological protection measures (TPMs). Proponents of weak or nonexistent copyright continue to publish and lobby Parliament, where a special committee to review the proposed legislation is expected to be formed by mid-November. End summary.

¶2. (SBU) Although most Canadian rightsholder industry associations still publicly hope for a notice and takedown regime, industry reps have privately told econoff that they are preparing to accept the currently-proposed notice and notice system in the course of negotiations with GOC. In fact, some industry associations plan to use the anticipated USG insistence on notice and takedown as a chance to play good cop to our bad cop, and they will present their acceptance of notice and notice as a signal to the GOC that they are willing to be "more reasonable than the Americans".

¶3. (SBU) Industry representatives are newly concerned that the wording of the internet service provider (ISP) liability waiver in the proposed amendments may be interpreted to again make peer-to-peer filesharing legal in Canada, an eventuality that industry representatives on either side of the border will see as disastrous. Section 31.1(1) of the draft amendment states, "A person who, in providing services related to the operation of the Internet or other digital network, provides any means for the telecommunication of a work or other subject-matter or a reproduction of it through that network does not, solely by reason of providing those means, infringe copyright..." and section 31.1(2) adds that "a person...who performs any other acts related to the telecommunication that render it more efficient...does not, by virtue of those acts alone, infringe copyright..." Industry representatives fear that peer-to-peer filesharing services could be argued to be a "means for the telecommunication" and an act to "render it more efficient" and therefore could be exempted from liability under these sections.

¶4. (SBU) The question of technological protection measure (TPM) circumvention continues to focus on two concerns: the need to prove intent to infringe in order for circumvention of TPMs to be considered illegal, and the fact that the bill as drafted contains no language making the trafficking of circumvention "tools" (such as video game mod chips or DVD-hacking software) illegal. Both of these concerns have been prevalent in industry commentary since the draft text was first tabled (see reftels). Some commentators have suggested that "trafficking in tools" could be somehow folded into or added to the section that provides legal remedies against a person who "offers or provides a service to circumvent" (section 34.02(2)).

¶5. (SBU) Meanwhile, in the midst of this chorus of industry displeasure at the content of C-60, a lone happy ISP representative presented a very upbeat reaction at last week's C-60 conference in Toronto. Seemingly, ISPs have no complaint with the text of C-60 as drafted--in fact, this representative's only substantive input was to ask that rightsholders be required to pay ISPs to forward and retain the notices of infringement under the notice and notice scheme (as currently laid out in section 40.2(2) of C-60.) The fact that ISPs are the sole enthusiastic and fully-satisfied stakeholder in the process highlights the bargaining power of the ISPs in this process. They have been given a bill which exempts them from any liability for

infringing content on their members' sites and does not require them to take down such infringing material unless there is a court order; in addition, they will potentially be able to charge stakeholders for the notice process itself.

¶6. (SBU) "Copyleft" academics who argue against copyright in general continue to receive significant press time and seem to be increasing their lobbying efforts directed at Parliament. University of Ottawa professor and columnist Michael Geist has published a collection of papers claiming to put the reform proposals into context ("In the Public Interest The Future of Canadian Copyright Law" available at www.michaelgeist.ca for C$50 or for free download). His University of Ottawa colleague Ian Kerr addressed a breakfast in the Parliamentary dining room last week on the subject of C-60. Dr. Kerr is another "information wants to be free" advocate, and he focused on what he sees as a need for protection against TPMs, since in his opinion they can too easily become surveillance devices that invade the privacy of users. (Comment: an econ staffer was present in the audience and attempted to provide a balancing view, pointing out that Canada's existing laws do not put excessive power in the hands of rightsholders. End comment.)

¶7. (SBU) We expect the bill to be put before an as-yet unformed special committee, which should be assembled by the middle of November. Parliamentary insiders suggest that the special committee may make the process faster, but few observers expect that the bill will pass before Parliament faces another election which is expected by Spring 2006 (comment: faced with such a flawed document, some industry representatives are stuck hoping that the legislation, for which they pushed so long and hard, will die in committee. See ref A for details.)

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